#### KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

#### **WASHINGTON HARBOUR, SUITE 400** 3050 K STREET, NW WASHINGTON, D.C. 20007-5108

NEW YORK, NY CHICAGO, IL STAMFORD, CT PARSIPPANY, NJ

(202) 342-8400

FACSIMILE (202) 342-8451 www.kelleydrye.com

GENEVIEVE MORELLI

DIRECT LINE:

EMAIL: gmorelli@kelleydrye.com

AFFILIATE OFFICES MUMBAI, INDIA

BRUSSELS, BELGIUM

July 17, 2008

#### VIA ECFS

Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554

Re:

Notice of Ex Parte Presentation: In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97

#### Dear Ms. Dortch:

Today, Tony Hansel, of Covad Communications, Lisa Youngers, of XO Communications, and Brad Mutschelknaus and the undersigned, of Kelley Drye & Warren, LLP, met with Greg Orlando, Legal Advisor for Commissioner Tate. During that meeting, we presented information addressing the steps that must be met before forbearance is justified and showing that forbearance is not warranted in the above-captioned proceeding.

The attached presentation was provided at the meeting.

#### KELLEY DRYE & WARREN LLP

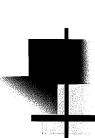
Ms. Marlene H. Dortch July 17, 2008 Page 2

Please contact the undersigned at (202) 342-8531, if you have any questions about this letter.

Respectfully submitted,

Genevieve Morelli

Attachment



# PETITIONS OF QWEST CORP. FOR FORBEARANCE IN THE DENVER, MINNEAPOLIS-ST.PAUL, PHOENIX, AND SEATTLE MSAs

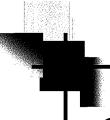
WC DOCKET NO. 07-97 July 17, 2008

Covad Communications
NuVox Communications
XO Communications



#### Step 1

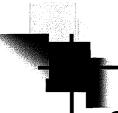
- Qwest must show successful competition in the aggregate in each MSA
  - Competition must be evaluated separately for each relevant product market
    - Extreme vigor in analyzing the mass market, enterprise market, and broadband market is warranted
  - Competition must be facilities-based
  - QPP, resale, UNE, special access, and over-the-top VoIP lines do not qualify



## **Section 251(c) Forbearance Framework**

#### Step 1 (cont'd)

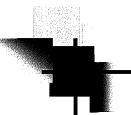
- Must be more than one facilities-based competitor serving the MSA
  - The duopoly that would result if only one facilities-based competitor would be contrary to the public interest
- Facilities-based competitors must be providing substitutable services in the relevant product market



## **Section 251(c) Forbearance Framework**

#### Step 2

- If the Step 1 analysis meets the established threshold, a more granular analysis must be conducted
- For each product market, competitors' facilities-based coverage by wire center must be ascertained
  - Facilities must be able to be used to provide substitutable services in the relevant product market within a commercially reasonable period of time



## **Section 251(c) Forbearance Framework**

#### Step 3

- For each wire center that meets the coverage threshold (*i.e.*, 75%), the level of actual facilities-based competition in that wire center must be ascertained
- Step 4
  - Other Section 10 criteria must be satisfied



- Qwest has not produced appropriate or sufficient product market-specific data
  - Qwest relies on anecdotal material for the enterprise market
    - Unlike in *Omaha*, this record has specific data showing insignificant competitive market share of enterprise customers
  - Data for the mass market addresses only a subset of the market
    - Residential only; small business ignored
  - No broadband market data filed



- Qwest erroneously includes non facilities-based lines (e.g., QPP and resale) in its analysis
- Qwest admits its data are only estimates that cannot substitute for actual line count data
  - Qwest concedes that actual cable data is required both for accurate market share and coverage test calculations
    - Cox line count data for the Phoenix MSA confirms there is insufficient competition to warrant forbearance

## The Mass Market Data Produced By Qwest Is Fundamentally Flawed (Cont'd)

- Wireless lines should be excluded from the analysis
  - Wireless lines today are not a complete substitute for wireline services in any product market
    - Economists, Inc. paper establishes that wireline and wireless constitute separate product markets
- If wireless lines are included, their inclusion must be limited to the residential voice market

## The Mass Market Data Produced By Qwest Is Fundamentally Flawed (Cont'd)

- Wireless data used by the Commission must be from a neutral third party
  - If the CDC Survey is used, the adjustments suggested in the Gillan Associates paper must be made
    - Use of the appropriate regional wireless-only number
    - Use of the lower bound of the 95% confidence interval
    - Identifiable groups that are not representative of the population as a whole should be excluded
      - College-age respondents should be excluded



- An aggregate market share for the enterprise market must be ascertained
- GeoResults is a neutral source for data on the extent of facilities-based competition in the enterprise market
  - GeoResults data for the 4 MSAs at issue has been obtained by the competitors
  - XO and other competitors have filed their own facilities penetration data, which confirm the GeoResults industry-wide analysis

## CLECs Connect with Their Own Facilities to a Miniscule Percentage of Commercial Buildings in the Affected MSAs

MSA	Total Number of Commercial Buildings in MSA	% of Commercial Buildings Served by Facilities-Based CLECs
Denver	104,385	0.24%
Minneapolis/ St.Paul	124,740	0.26%
Phoenix	127,763	0.17%
Seattle	127,880	0.18%

#### Even in the Most Competitive Wire Centers, All CLECs Combined Connect with Their Own Facilities to Very Few Commercial Buildings

MSA	Wire Center with Highest Percentage of Commercial Buildings Served by Facilities-Based CLECs	Total Number of Commercial Buildings in Wire Center	Percentage of Commercial Buildings Served by Facilities- Based CLECs
Denver	ENWDCOMA	2433	2.28%
Minneapolis/ St.Paul	MPLSMNDT	1574	3.63%
Phoenix	Phoenix PHNXAZSE		1.46%
Seattle	STTLWAEL	666	3.15%

### No Commercial Building is Connected to CLEC Facilities in Approximately One-Half of Affected Wire Centers

MSA	Total Number of Wire Centers in MSA	Total Number of Wire Centers with No Buildings Served by Facilities-Based CLEC	Percentage of Wire Centers with No Buildings Served by Facilities-Based CLECs
Denver	47	20	43%
Minneapolis/ St.Paul	140	84	60%
Phoenix	76	39	51%
Seattle	69	30	43%

# All CLECs Combined Seldom Serve More Than 5% of the Addressable Market Using Their Own Facilities

MSA	Number of Wire Centers in MSA with Facilities-Based CLEC Addressable Demand Market Share Between 0%-5%	Number of Wire Centers in MSA with Facilities-Based CLEC Addressable Demand Market Share Between 5%-10%	Number of Wire Centers in MSA with Facilities-Based CLEC Addressable Demand Market Share Between 10%-15%	Number of Wire Centers in MSA with Facilities-Based CLEC Addressable Demand Market Share Above 15%
Denver	41	3	3	0
Minneapolis / St.Paul	133	6	1	0
Phoenix	72	4	0	0
Seattle	66	2	1	0



- State regulators, legislators, and consumer advocates have stated that facilities-based competition in Arizona, Colorado, Minnesota, and Washington is not sufficiently robust to justify UNE forbearance
- Because Qwest has failed to show that successful competition exists at the aggregate (i.e., MSA) level in any product market, its petitions must be denied